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In the Supreme Court of the United States

OCTOBER TERM, 1984

VIRGIL RAYMOND CATLETT, III, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether scienter is a necessary element of an offense under Section 2 of the Migratory Bird Treaty Act, 16 U.S.C. 703, which provides that "[u]nless and except as permitted by regulations * * *, it shall be unlawful * * * to pursue, hunt, take, capture, kill, attempt to take, capture, or kill * * * any migratory bird * * *," and 50 C.F.R. 20.21(i), which implements the Act by providing that "[n]o person shall take migratory game birds * * * on or over any baited area."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) and the opinion of the district court (Pet. App. A8-A22) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7) was entered on November 19, 1984. On January 17, 1985, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 28, 1985. The petition was filed on January 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

1. Section 2 of the Migratory Bird Treaty Act, 16 U.S.C. 703, provides in pertinent part:

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, * * * any migratory bird * * * included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972.

2. The implementing regulation at issue, 50 C.F.R. 20.21, provides in pertinent part:

Migratory birds on which open seasons are prescribed in this part may be taken by any method except those prohibited in this section. No person shall take migratory game birds:

* * * * *

(i) By the aid of baiting, or on or over any baited area. As used in this paragraph, "baiting" shall mean the placing, exposing, depositing, distributing, or scattering of shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed so as to constitute for such birds a lure, attraction or enticement to, on, or over any areas where hunters are attempting to take them; and "baited area" means any area where shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed whatsoever capable of luring, attracting, or enticing such birds is directly or indirectly placed, exposed, deposited, distributed, or scattered; and such

area shall remain a baited area for 10 days following complete removal of all such corn, wheat or other grain, salt, or other feed.

STATEMENT

Except as permitted by regulations, the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*, makes it unlawful for any person, "at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill * * * any migratory bird." 16 U.S.C. 703. Section 6(a) of the Migratory Bird Treaty Act, 16 U.S.C. 707(a), provides that "any person * * * who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months, or both." Petitioners were tried before a United States Magistrate, found guilty of taking or attempting to take migratory game birds "on or over any baited area," in violation of 50 C.F.R. 20.21(i), and fined $50 each (Pet. App. A8).

On appeal to the district court, petitioners argued that the charges should have been dismissed because there was no proof that petitioners knew or reasonably should have known that the field had been baited (Pet. App. A17).[1] The

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[1]On August 26, 1982, agents of the Tennessee Wildlife Service inspected a field located in Bledsoe County, Tennessee, and found several piles of bait comprised of wheat, corn, and millet (Pet. App. A2). On September 4, 1982, less then ten days later, state and federal agents cited petitioners for hunting migratory birds on a baited field (*ibid.*). The agents were able to locate piles of bait on that date only "with some difficulty" (Pet. App. A15). All petitioners testified that none of them saw any bait on the field (*ibid.*). Under 50 C.F.R. 20.21(i), a field remains a "baited area" for ten days following complete removal of the bait. The reason for the rule is that the attraction of bait remains even after removal. See *United States* v. *Jarman*, 491 F.2d 764, 766 n.4 (4th Cir. 1974). The rule also prevents hunters from baiting a field before the season begins in order to create an attraction for the birds after the

district court rejected the argument (*id.* at A17-A18). Following *United States* v. *Brandt*, 717 F.2d 955, 958-959 (6th Cir. 1983), and *United States* v. *Green*, 571 F.2d 1, 2 (6th Cir. 1977), the court held that scienter is not an element of the offense charged under the regulation.[2]

The court of appeals affirmed the misdemeanor convictions (Pet. App. A1-A6). Although it observed that "[t]he unfortunate [petitioners] were apparently unaware of, and had not participated in, the baiting of the field" (*id.* at A2), the court, quoting *United States* v. *Green*, 571 F.2d at 2, held that 50 C.F.R. 20.21(i) "does 'not require proof of knowledge' " (Pet. App. A4). The court further noted (*ibid.*) that the view that scienter is not required for a conviction for hunting migratory birds over a baited area is the majority view. The court acknowledged (*id.* at A5) that the United States Court of Appeals for the Fifth Circuit, in *United States* v. *Delahoussaye*, 573 F.2d 910, 912 (1978), held "that a minimum form of scienter—the 'should have known' form—is a necessary element of the offense." Although the court of appeals found the reasoning in *Delahoussaye* to be "appealing," it also noted that the Sixth Circuit, in *United States* v. *Brandt*, 717 F.2d at 958 n.3, had previously declined to follow *Delahoussaye* (Pet. App. A5).

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season has opened. See *Koop* v. *United States*, 296 F.2d 53, 56-58 (8th Cir. 1961) (attraction for ducks continued for at least four days after baiting ceased).

[2]Petitioners also argued that the evidence did not support a finding of guilt beyond a reasonable doubt, that the state and federal agents violated the Fourth Amendment by entering the field and taking samples of the bait, and that their convictions for violating an administrative regulation contravened the Fifth Amendment. The district court rejected each argument (Pet. App. A18-A21), and the court of appeals also rejected challenges to the sufficiency of the evidence (*id.* at A4 n.3) and to the validity of the regulation (*id.* at A6 n.5). Petitioners have not raised these arguments in this Court.

ARGUMENT

The decision of the court of appeals is correct. Although there is a conflict among the circuits on the issue whether scienter is an element of an offense under 50 C.F.R. 20.21(i), we do not believe that review by this Court is necessary at this time.

1. Petitioners contend (Pet. 12) that it was "fundamentally unfair" to find them guilty of taking or attempting to take migratory game birds "on or over any baited area" because there was no proof that petitioners knew or reasonably should have known that the field had been baited. Petitioners urge this Court (Pet. 17-19) to interpret 50 C.F.R. 20.21(i) as requiring a minimal level of scienter, *i.e.*, that the hunter should have known that the field in question was baited.

Petitioners do not contend, however, that Congress cannot provide for strict liability criminal offenses. In *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 70 (1910), this Court held that "public policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." When Congress exercises its regulatory powers for the public welfare, particularly in areas not known to the common law, see *Morissette* v. *United States*, 342 U.S. 246, 250-256 (1952), it may for the purpose of achieving some social good make criminal actions that are taken with no awareness of wrongdoing. See, *e.g.*, *United States* v. *Park*, 421 U.S. 658, 670-673 (1975) (unsanitary storage of food for sale); *United States* v. *Freed*, 401 U.S. 601, 607 (1971) (possession of unregistered firearm); *United States* v. *Dotterweich*, 320 U.S. 277, 280-281 (1943) (shipment of adulterated and misbranded drugs in interstate commerce); *United States* v. *Behrman*, 258 U.S. 280 (1922) (sale of narcotic substance). Whether scienter is an element of a

statutory crime is a question of legislative intent. *United States* v. *Balint,* 258 U.S. 250, 251-252 (1922).

2. In *North Dakota* v. *United States,* 460 U.S. 300, 309-310 (1983) (footnote omitted), this Court reaffirmed that the purpose of the Migratory Bird Treaty Act is to protect a matter important to the public welfare:

> The protection of migratory birds has long been recognized as "a national interest of very nearly the first magnitude." *Missouri* v. *Holland,* 252 U.S. 416, 435 (1920). Since the turn of the century, the Secretaries of Agriculture and of the Interior successively have been charged with responsibility for the "preservation, distribution, introduction, and restoration of game birds and other wild birds." Act of May 25, 1900, 31 Stat. 187, 16 U.S.C. § 701. A series of treaties dating back to 1916 obligates the United States to preserve and protect migratory birds through the regulation of hunting, the establishment of refuges, and the protection of bird habitats.

The wording of 16 U.S.C. 703 has remained the same since passage of the Migratory Bird Treaty Act in 1918. From the earliest cases, it has been held that the government need not prove that a defendant violated the Act's provisions with either guilty knowledge or specific intent to commit the violation. In *United States* v. *Schultze,* 28 F. Supp. 234, 236 (W.D. Ky. 1939), the district court, noting that the statute fails to use the word "willfully" or the word "knowingly," or any similar phrase, concluded that Congress did not intend to make scienter an element of an offense under 16 U.S.C. 703:

> In view of the broad wording of the act, and the evident purpose behind the treaty and the act, this Court is of the opinion that it was not the intention of Congress to require any guilty knowledge or intent to complete the commission of the offense * * *. The beneficial

> purpose of the treaty and the act would be largely nullified if it was necessary on the part of the government to prove the existence of scienter on the part of defendants accused of violating the provisions of the act.[3]

See also *United States* v. *Reese,* 27 F. Supp. 833, 834 (W.D. Tenn. 1939) ("Nowhere in the statute, or in the regulations promulgated pursuant thereto, will be found, either in express language or by necessary implication, any requirement of averment or proof of scienter to constitute a punishable violation of the statutory offense charged."). The district court in *Reese* supported its holding that Congress did not make scienter an element of the offense by noting that the penalty imposed is neither harsh nor severe and is within the discretion of the trial judge. *Id.* at 835. The court also held that Congress could not have intended to place upon the government "the extreme difficulty of proving guilty knowledge of bird baiting" in light of Congress's clear purpose "to make real the protection against the holocaustic slaughter of migratory birds" (*ibid.*).[4]

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[3]The underlying facts in *Schultze* are strikingly similar to the facts of this case. The defendants in *Schultze* contended that, inasmuch as they did not place the bait in the field in question, and did not know that the field was baited at the time of the hunt, their acts should not be deemed to have constituted a violation of 16 U.S.C. 703 and of the earlier regulatory version of 50 C.F.R. 20.21(i). *United States* v. *Schultze,* 28 F. Supp. at 235.

[4]The conclusion that scienter is not an element of the offense also is supported by the fact that several bills have been introduced in Congress to incorporate the element of scienter. See, *e.g.,* H.R. 14310, 90th Cong., 1st Sess. (1967); H.R. 15088, 90th Cong., 2d Sess. (1968); H.R. 567, 93d Cong., 1st Sess. (1973); and H.R. 1516, 94th Cong., 1st Sess. (1975). In 1973, hearings were held on unsuccessful legislation expressly "designed to put an end to the innocent hunter being arrested for hunting migratory waterfowl over a baited field." *Fish and Wildlife Miscellaneous—Part 2: Duck Baiting—Arkansas Land Conservation:*

3. As noted by the court of appeals (Pet. App. A4-A5), the majority view among the circuits is that there need be no showing that violators baited the field or that they knew it was baited. See *United States* v. *Chandler*, 753 F.2d 360, 363 (4th Cir. 1985); *United States* v. *Brandt*, *supra*; *United States* v. *Jarman*, 491 F.2d 764, 766-767 (4th Cir. 1974); *United States* v. *Ireland*, 493 F.2d 1208, 1209 (4th Cir. 1973); and *Rogers* v. *United States*, 367 F.2d 998, 1001 (8th Cir. 1966), cert. denied, 386 U.S. 943 (1967).[5] To be sure, as petitioners stress (Pet. 13-15), the Fifth Circuit, in *United States* v. *Delahoussaye*, 573 F.2d at 912, held that "a minimum form of scienter—the 'should have known' form—is a necessary element of the offense."[6] The decision in *Delahoussaye*, however, neither discussed the cases from other circuits that have reached the opposite conclusion nor addressed the decisions of this Court that have upheld the

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Hearings on H.R. 567 and H.R. 1820 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93d Cong., 1st Sess. 1-2 (1973) (statement of Rep. Dingell).

[5]Several district courts also have held that it is unnecessary under 16 U.S.C. 703 and 50 C.F.R. 20.21(i) for the government to prove that the hunter knew that the field in question was baited. *United States* v. *Atkinson*, 468 F. Supp. 834, 836 (E.D. Wis. 1979); *United States* v. *Ardoin*, 431 F. Supp. 493, 495 (W.D. La. 1977); *United States* v. *Bryson*, 414 F. Supp. 1068, 1073 (D. Del. 1976); *United States* v. *Tarmon*, 227 F. Supp. 480, 482 (D. Md. 1964).

[6]Petitioners also assert (Pet. 13) that the decision of the court of appeals conflicts with the conclusion of the Tenth Circuit in *Allen* v. *Merovka*, 382 F.2d 589, 591 (1967), that 50 C.F.R. 20.21(i) requires proof either that the hunters were involved with the baiting or that it was done for their benefit. The court in *Allen*, however, was concerned with the taking of migratory birds "[b]y the aid of baiting" (50 C.F.R. 20.21(i)) (see 382 F.2d at 590). Petitioners, on the other hand, were charged with taking migratory birds "on or over any baited area." 50 C.F.R. 20.21(i). The two prohibited kinds of conduct are of a different nature and scope. See *United States* v. *Bryson*, 414 F. Supp. 1068, 1072-1074 (D. Del. 1976).

promulgation by Congress of strict liability criminal offenses. In contrast, the courts that have held that scienter is not an element of an offense under 50 C.F.R. 20.21(i) have based their conclusions on an analysis of the purpose behind the Migratory Bird Treaty Act and have found that, since the purpose of the Act is to protect a matter important to the public welfare, the regulation promulgated thereunder is constitutional despite its lack of an intent requirement. See, *e.g.*, *United States* v. *Brandt*, 717 F.2d at 958-959; and *United States* v. *Jarman*, 491 F.2d at 766-767.

We believe that the Fourth, Sixth, and Eighth Circuits are correct. And, despite the disagreement among the circuits, we do not believe that it is necessary for the Court to review this issue at this time. The better course would be to give the Fifth Circuit the opportunity to reexamine its interpretation of 16 U.S.C. 703 and 50 C.F.R. 20.21(i). Should the Fifth Circuit adhere to the view that the statute and regulation contain a minimum scienter requirement, or should another circuit adopt the rationale of *Delahoussaye*, it might well be appropriate to correct a continuing, erroneous view of the Migratory Bird Treaty Act in order to prevent the diminution of the beneficial purposes of the Act. This case, however, does not jeopardize those purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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